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Background & Talking Points

H.R. 3313, the Marriage Protection Act

Background

The Marriage Protection Act, which was introduced by Rep. John Hostetler (R-IN), would remove jurisdiction from the Supreme Court and other federal courts to hear any challenges to the first part of the 1996 Defense of Marriage Act (DOMA). The first part of DOMA states that no state shall be obligated to recognize a same sex marriage authorized by another state. The House Judiciary reported the bill on July 14, 2004 and it is expected to be considered by the House on July 22, 2004.

Constitutionality

There is considerable debate about the scope of Congressional power to strip the courts of jurisdiction. Some legal experts believe that such a sweeping court stripping measure is clearly not Constitutional. Others believe that Congress does have the authority to court strip. There are few legal precedents so this is an untested area of law.

The Judiciary Committee majority cites a number of cases in which Congress has stripped courts of jurisdiction under particular circumstances. Their cases (including a Sen. Daschle provision regarding some land in South Dakota) are fundamentally different than the current proposal. In each of these cases the court stripping was very limited. In addition, in none of these cases were Constitutional rights challenges prohibited. The Judiciary Committee Democrats have a summary of each of the cases being cited that is available.

Talking Points

It undermines the uniformity of federal law

This bill is precedent setting. If the bill is found to be constitutional, any challenges to DOMA will be heard in state courts. Therefore, state court interpretations of the Constitutionality of DOMA can be different in each state. Once this door is opened, when Democrats are in the majority we may apply it in ways the Republicans don't like. For example, Congress could pass a gun control bill that prevents anyone from owning a gun and include a court stripping provision. Then each state court will determine whether it is constitutional. For example, in New York the court could decide that it is constitutional while the Pennsylvania court determines it is not.

If this precedent is set, Democrats in the majority could prevent takings challenges to the Endangered Species Act or on wetland protection legislation. We could apply this to consumer protection legislation, telecommunications policy, insurance law, securities law, etc...

The proponents of the bill are also considering using court stripping for home schooling, vouchers, school prayer, environmental laws, reproductive choice and more.

It is unconstitutional

There are serious equal protection, due process and separation of powers problems. In *Romer v. Evans* (1996) the Supreme Court ruled that under the Equal Protection clause, a class of people cannot be singled out for disparate treatment if the motive for doing so is based on animus. In addition, because state courts are often hostile to federal interests, the bill runs afoul of due process guarantees of access to a neutral forum to hear grievances.

It does grave damage to separation of powers

The Supreme Court is a coequal branch of our government. Our system of checks and balances has served our nation well. Although the author of the bill has said about *Marbury v. Madison* (1803) that "part of the case was wrongly decided" in reference to the power of the judiciary to conduct judicial review.

At the subcommittee hearing on court stripping, the Majority witness Martin Redish from Northwestern Law School generally believed that in most circumstances court stripping was Constitutional, but that Congress should rarely use that power. He stated: "I firmly believe that Congress should choose to exercise this power **virtually never** [emphasis added]."

July 20, 2004